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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JULIA BRAGA et al., Plaintiffs and Appellants, v. PAM OGDEN, Defendant and Appellant.	D052381 (Super. Ct. No. GIC867257)

APPEALS from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

These cross-appeals concern a property dispute between Pam Ogden and her Coronado neighbors, Julia Braga and George Wiley. After Braga and Wiley sued Ogden in superior court, a jury found that Ogden wrongfully removed approximately 30 Italian Cypress trees on Wiley and Braga's property and ordered Ogden to pay $129,620 in compensatory damages. The damages award was then doubled pursuant to Civil Code

section 3346, subdivision (a), which permits double recovery for "wrongful injuries to timber."

Ogden appeals, contending that the jury's verdict must be reversed on a number of grounds. She contends that: (i) the trial court erred in excluding testimony that Ogden had requested permission from another neighbor to remove landscaping from her property line; (ii) the jury's finding that Braga did not consent to the removal of the trees is unsupported by substantial evidence; and (iii) the trial court erred in declining her proposed jury instruction on the appropriate means of calculating damages for the removal of trees. As discussed in part I of this opinion, we find these contentions to be without merit.

Braga and Wiley also appeal, arguing that the trial court abused its discretion in declining, after the jury's verdict, to award them attorney fees (see Code Civ. Proc., § 1029.8) and prejudgment interest (see Civ. Code, § 3287, subd. (a)). As discussed in part II of this opinion, we conclude these contentions are also without merit.

FACTS

In May 2005, Ogden purchased property in Coronado, located at 432 Glorietta Boulevard. She intended to demolish the existing house and build a new one.

In October 2005, Braga and her grandfather, Wiley, bought the property next door, located at 436 Glorietta Boulevard. Braga and Wiley too planned to demolish the existing structure on the property and build a new home.

As part of Ogden's building project, in January 2006 she had approximately 30 Italian Cypress trees that divided part of her property from Braga and Wiley's property cut down. Almost all of the trees were located on Braga and Wiley's property.

Braga sent a series of letters to Ogden protesting the removal of the Cypress trees and seeking compensation. When Ogden declined to respond, Braga and Wiley filed a complaint in superior court alleging causes of action for trespass; conversion; wrongful cutting and removal of trees; and unjustified or negligent removal of trees.

DISCUSSION

I

Ogden's Appeal

Ogden raises three challenges on appeal. We consider each separately below.

A. *The Trial Court Did Not Abuse Its Discretion in Excluding Evidence of Ogden's Request for Consent to Remove Landscaping from Another Neighbor*

Ogden first contends that the trial court abused its discretion in excluding evidence that, on a separate occasion, Ogden sought permission from a different neighbor to remove certain landscaping. We address this contention after describing the trial court's ruling.

1. *The Trial Court's Ruling*

Prior to trial, Ogden indicated her intent to offer testimony from her neighbors Ann and Ward Wilson (the Wilsons). According to Ogden, the Wilsons would testify that at around the same time Ogden cut down the Cypress trees, she obtained permission from the Wilsons to remove "mature landscaping" on the property line separating her

property from the Wilsons' property. Ogden contended that the testimony was relevant to show that Ogden's "custom was to obtain the consent of her neighbors before removing landscaping on their common property line." Ogden also asserted that the testimony was relevant to corroborate her testimony that she obtained Braga's consent. Braga and Wiley filed an in limine motion to exclude the Wilsons' testimony on the ground that it was irrelevant and impermissible character, habit or custom evidence.

The trial court held a hearing on the admissibility of the Wilsons' testimony. At the hearing, Ogden's counsel refined the argument for admissibility, stating that the testimony "is not offered to prove custom or habit" but rather "would be offered to corroborate receipt of consent" from Braga. Counsel argued "[r]eceipt of consent from one [neighbor] would be circumstantial evidence of receipt of consent [from] the other."

The trial court excluded the evidence under Evidence Code section 352. The court stated that the proffered evidence was insufficient "to show habit or custom" and was "very tenuous in terms of probative value." The court stated the evidence also possessed a high likelihood of confusing the jury, and causing undue consumption of time and unfair prejudice.

2. *The Trial Court Did Not Abuse Its Discretion in Excluding the Wilsons' Testimony*

Ogden contends that the trial court abused its discretion in excluding the evidence because the Wilsons' testimony "bore on . . . credibility" and "had a tendency in reason to prove that [Ogden] would not have cut down [Braga and Wiley's] trees without their permission."

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id.*, § 210.) In addition, even when evidence is relevant, the trial court "may exclude [that] evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Id.*, § 352.)

In determining the relevance of evidence and whether it should be excluded as unduly prejudicial, confusing or misleading, the trial court is vested with broad discretion, and its rulings will be reversed on appeal only where an abuse of that discretion is established. (*People v. Harris* (2005) 37 Cal.4th 310, 337; *People v. Jordon* (1986) 42 Cal.3d 308, 316.) The burden to establish such an abuse of discretion lies with the party complaining on appeal. (*Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, 1307.)

Applying this standard, we conclude that Ogden has failed to demonstrate that the trial court's ruling constituted an abuse of discretion.

A key element of this failure is that, even on appeal, Ogden cannot provide a coherent explanation for the relevance of the Wilsons' testimony. Consistent with her revised position in the trial court, Ogden asserts that the evidence "was offered as circumstantial evidence corroborating credibility, not custom or habit character evidence to prove conduct on a specified occasion." Attempting to drive home the point through repetition, Ogden asserts without elaboration, that the testimony "bore on several issues

of credibility," constituted "circumstantial evidence corroborating credibility," was "relevant to the credibility of Ogden as a witness," and "was offered to corroborate Ogden's credibility."[1] Ogden, however, never explains *how* the Wilsons' testimony would have corroborated her credibility.

The fact that Ogden purportedly sought the permission of another neighbor prior to removing "mature landscaping" from a property line did not speak to Ogden's general credibility as a witness, and did little to corroborate Ogden's specific testimony that she obtained consent *from Braga*. The only clear relevance of this evidence as corroboration is that the Wilsons' testimony, *if accepted to indicate a custom or habit*, corroborates a specific aspect of Ogden's testimony — that she asked Braga for permission to remove the Cypress trees. As Ogden explicitly concedes the evidence was *not* offered as custom or habit evidence, however, this sole line of logical relevance is foreclosed. (See, e.g., *People v. McPeters* (1992) 2 Cal.4th 1148, 1178 [recognizing habit or custom evidence as evidence of "'*repeated* instances of similar conduct'" (italics added)]; 1 Witkin, California Evidence (4th ed. 2000) § 67(1), p. 404 [recognizing habit or custom evidence as evidence of a person's "regular response to a repeated specific situation"].) Thus, the evidence had, at most, minimal probative value under Evidence Code section 352.

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1 In her reply brief, Ogden adds that the evidence also "show[ed] Ogden's plan and intent to be a good neighbor, and to get permission before cutting anything along any of the property lines." We deem this contention forfeited. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4 [argument not raised in opening brief and not "fully made" in reply brief forfeited for purposes of appeal].)

With respect to the other side of the Evidence Code section 352 balance, the trial court appropriately identified valid considerations supporting exclusion of the Wilsons' testimony. There was a strong probability that the evidence would consume significant trial time both in its initial presentation to the jury and through the inevitable effort by Braga and Wiley to counter the evidence by highlighting (through argument, cross-examination and/or rebuttal evidence) ways in which the situation with the Wilsons was distinguishable. This presentation could have distorted the jury's focus on whether Braga (as opposed to the Wilsons) had consented in the instant case.

There was also significant potential for undue prejudice. The jury may have utilized the evidence as character, habit or custom evidence — a purpose that Ogden essentially concedes would have been improper. While Ogden argues that the trial court could have minimized this potential through a limiting instruction, limiting instructions are not failsafe and even when heeded create the potential for jury confusion.

In sum, given the limited probative value of the Wilsons' proffered testimony and the countervailing considerations of undue prejudice, consumption of time and jury confusion, we conclude that Ogden fails to satisfy her burden of demonstrating that the trial court abused its discretion in making its evidentiary ruling regarding the Wilsons' testimony.

B. *Substantial Evidence Supports the Jury's Finding on Consent*

Ogden next contends that the jury's finding that Braga did not consent to the removal of the Cypress trees is unsupported by substantial evidence. We disagree.

In evaluating a challenge to the evidence supporting a jury verdict, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible and of solid value — from which a reasonable trier of fact could" reach the challenged finding. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) In performing our review of the record, we are limited by the fact that it "'"is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends."'" (*People v. Smith* (2005) 37 Cal.4th 733, 739.) We are, thus, not permitted "to reweigh the evidence or redetermine issues of credibility" (*People v. Martinez* (2003) 113 Cal.App.4th 400, 412), and even the "uncorroborated testimony of a single witness is sufficient" to support a factual finding in the face of a substantial evidence challenge "unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296 (*Scott*).)

The issue of consent was the central issue in the trial. Braga testified that she did not give Ogden permission to remove the Cypress trees; Ogden testified that Braga gave her consent to cut down the trees. The disagreement arose out of the disputed significance of a conversation that occurred in late 2005. Braga acknowledged that during that conversation, Ogden mentioned that she would be removing some trees. Braga testified she thought Ogden was referring to trees other than the Cypress trees; Braga explained that she assumed Ogden would not have so nonchalantly stated that she intended to remove the Cypress trees, as they were located on Braga's property. An architect who overheard Braga and Ogden's conversation also testified that he did not

recall hearing any discussion of the Cypress trees. Ogden maintained that Braga consented to the removal of the trees in that conversation.

In light of the conflict in the evidence at trial regarding consent, Ogden contends that the jury's finding that Ogden did not obtain permission to remove the trees is unsupported by substantial evidence. Specifically, Ogden argues that no reasonable jury could have believed Braga because Braga's trial testimony was inconsistent with the testimony Braga gave in an earlier deposition. At trial, Ogden's counsel impeached Braga with her earlier deposition testimony, in which Braga stated that Ogden told her she was going to cut down the Cypress trees, and Braga said she responded: "'Okay. If they're your trees.'"

Ogden's challenge fails due to the narrow scope of appellate court review of findings of fact. In particular, as we have already noted, questions of credibility are for the jury. Consequently, it is well established that even the "uncorroborated testimony of a single witness is sufficient" to support a factual finding "unless the testimony is physically impossible or inherently improbable." (*Scott*, *supra*, 21 Cal.3d at p. 296.) Here Ogden's challenge to Braga's testimony falls far short of this standard. Braga explained the discrepancy with her deposition testimony during trial, stating, in essence, that she was confused in her deposition. Further, the deposition testimony only suggests Braga's consent to cut down the trees, if they were Ogden's trees — which a later property survey determined they were not. Thus, Braga's testimony cannot be labeled "inherently improbable," and it was for the jury, not a later court reading a cold appellate record, to evaluate the competing claims regarding consent. (See, e.g., *Evje v. City Title*

Ins. Co. (1953) 120 Cal.App.2d 488, 493 [affirming finding against substantial evidence challenge where "[a]though very strange [the challenged testimony was] not wholly inconceivable"].)

Ogden's reliance on *In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 279, for the contention that "[t]rial testimony obviously false as contradicted by prior deposition testimony is not substantial evidence . . ." is unavailing. In *Ananeh-Firempong*, the Second District *affirmed* a trial court finding against a challenge that the finding was unsupported by substantial evidence. The appellate court pointed out that in light of contradictory deposition testimony introduced at trial, the trial court was entitled "to disregard [the h]usband's trial testimony and his claimed confusion regarding his deposition testimony." (*Ibid.*) *Ananeh-Firempong* does not permit an appellate court to choose between inconsistent deposition and trial testimony, as Ogden would have us do here. Rather, it supports the uncontroversial position that in light of conflicting factual accounts introduced in a trial, the *fact finder* may choose the account to credit, and an appellate court will defer to that choice on appeal. In following this principle here, we defer to the jury's finding that Braga did not consent to the removal of the Cypress trees and reject Ogden's challenge to that finding.

C. *The Trial Court's Instruction Regarding Damages Was Not Erroneous*

Finally, Ogden contends that the trial court erred by declining to give her proposed instruction regarding damages. We evaluate this contention after setting forth the pertinent procedural history.

1. *The Proposed and Final Damages Instruction*

In a hearing regarding the proper jury instructions, Ogden proposed that the trial court provide the jury with the following instruction regarding damages:

> "Only reasonable cost[s] of replacing destroyed trees with identical or substantially similar trees may be recovered. Where the claim is for the cost of identical replacement of a substantial number of mature trees, it may be appropriate to award costs for the planting of the saplings or a few mature trees to achieve a lesser but over time reasonable aesthetic restoration."

The trial court indicated that it did not believe the proposed instruction was proper, because it suggested a particular outcome (awarding relatively low damages for saplings, or a lesser number of trees than originally planted) that was more properly the subject of argument than instruction. The trial court, then, suggested the following instruction:

> "There is no fixed, inflexible rule for determining the measure of damages for injury to or destruction of trees. Whatever formula is most appropriate to compensate the injured party for the loss sustained in a particular case should be adopted."

The parties both agreed to the trial court's proposal and the instruction was provided to the jury.

2. *The Error Was Forfeited and, in Any Event, There Was No Error*

Ogden argues that the trial court's rejection of her proposed instruction constitutes prejudicial error requiring reversal of the jury's verdict. We reject this challenge on two grounds.

First, Ogden's counsel agreed that the trial court's instruction was an adequate substitute for the proposed defense instruction. Ogden therefore cannot, after an adverse verdict, now complain that the instruction was erroneous.

As noted above, after Ogden proposed her instruction, the trial court stated that the instruction appeared argumentative and suggested a more general phrasing of the legal principle regarding damages to timber drawn from the same case that "might satisfy both" parties. Asked to comment on the trial court's proposal, Ogden's counsel stated, "That's fine." The court added that Ogden would be able to argue, under the proposed instruction, that "planting some saplings" would be sufficient damages. Ogden's counsel responded, "Yes." After both counsel agreed to the instruction, the trial court asked if there were any other concerns regarding the instructions. Ogden's counsel stated, "No, Your Honor, we're done."

We believe a fair reading of this colloquy is that after the trial court noted a flaw in Ogden's proposed instruction, Ogden's counsel agreed to an alternative instruction suggested by the trial court that "satisf[ied] both" parties. In such circumstances, we must conclude that Ogden acquiesced to any instructional error and thereby forfeited her challenge on appeal. (*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 857 [holding that where "appellants did not formally make an objection except to offer an alternative [instructional] definition, and they ultimately and expressly stated that they had no objection to the court's definition," any "error was thus waived"]; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1223 [holding that where the "defendant joined in" request for an instruction, any claim of error with respect to the instruction was waived on appeal]; *People v. Bolin* (1998) 18 Cal.4th 297, 326 [holding that where defense counsel agreed that proposed instruction was proper and did not object to it, "[a]ny claim of error is . . . waived" on appeal]; *People v. Stone* (2008)

160 Cal.App.4th 323, 331 [same]; cf. *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 742-743 [party could not complain of error on appeal where counsel for the party "acquiesced in and contributed to any such error"].)

Second, even assuming the claim is not forfeited, we would find it without merit. The instruction given by the trial court is a correct statement of law. (See *Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 ["'There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case, will be adopted'"].) By contrast, the instruction proposed by Ogden was argumentative in substance, requiring the court to suggest a measure of damages favorable to Ogden. (*Slayton v. Wright* (1969) 271 Cal.App.2d 219, 238 (*Slayton*) ["The giving of an instruction argumentative in form is error"].) As the court noted, such a statement regarding the possible propriety of replacing the mature trees with saplings (or a smaller number of trees) was more properly the subject of argument, not instruction.

We, therefore, see no basis to conclude that the trial court erred by rejecting Ogden's proposed instruction and instructing the jury with an alternative, more balanced statement of the law. (*Slayton*, *supra*, 271 Cal.App.2d at p. 238 [recognizing that court's instructions should not focus on one aspect of the evidence because that "'puts the court in the position of making an argument to the jury, and misleads the jury into thinking that because the court has specifically mentioned certain testimonial facts they are of undue importance or that the court believed them to be true'"].) "A party is not entitled to have the jury instructed in any particular fashion or phraseology, and may not complain if the

court correctly gives the substance of the applicable law." (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 553.)

II

Braga and Wiley's Appeal

Braga and Wiley challenge the trial court's refusal to award attorney fees and prejudgment interest. We evaluate these challenges separately below.

A. *Braga and Wiley Fail to Demonstrate an Abuse of Discretion in the Court's Refusal to Award Attorney Fees*

Braga and Wiley first contend that the trial court abused its discretion in declining to award them attorney fees at the conclusion of the trial proceedings. We disagree.

After prevailing at trial, Braga and Wiley filed a motion for attorney fees under Code of Civil Procedure section 1029.8. That section allows the trial court, "in its discretion," to require "[a]ny unlicensed person who causes injury or damage to another person as a result of providing goods or performing services for which a license is required" to pay the costs and attorney fees of the injured person. (Code Civ. Proc., § 1029.8, subd. (a).) In their motion, Braga and Wiley cited Business and Professions Code section 7026.1, subdivision (d) for the proposition that a license is required to remove a tree over 15 feet in height, and argued that Ogden was vicariously liable for attorney fees based on the unlicensed actions of her employees.[2]

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2 At trial it was established that Ogden hired persons from outside a Home Depot to cut down the trees. There was no evidence that these persons were licensed to remove the trees, and Ogden did not contend in her opposition to Braga and Wiley's attorney fee request that the persons she hired were appropriately licensed.

The trial court denied the motion. The court stated that the case was "not an appropriate case for attorney fees" because the absence of a license had nothing to do with the harm suffered. To the contrary, the record indicated that the persons who removed the trees did "a good job." Further, the court ruled, Braga and Wiley had been fully compensated for the removal of the trees under a directly applicable statute (Civ. Code, § 3346), which provided for double damages in the case of the wrongful removal of timber, and it would be inappropriate to further award attorney fees under a separate, more tangentially related statute.

On appeal, Braga and Wiley argue that "the trial court's decision to deny attorney fees was based on an erroneous statutory interpretation." This contention misunderstands the court's ruling. The trial court did *not* deny the request for attorney fees on the ground that the statute was inapplicable. Rather, the court stated that even assuming the statute applied, it was denying any award "to the extent that these fees are discretionary." The court then provided legally valid reasons for its exercise of discretion, including that the injury had no relationship to the absence of a license, and that Braga and Wiley had (through statutorily doubled damages) been adequately compensated for the destroyed trees. While Braga and Wiley respond to this reasoning with a number of arguments that might have supported a discretionary ruling in their favor, they come far short of demonstrating that the trial court *abused its discretion*.

Braga and Wiley contend "the statute does not require the licensing status to have caused the injury." They add for good measure that there was, in fact, a nexus between the harm and the absence of a license because "[a] licensed tree trimmer may have

ensured that Ogden verify who owned the trees before cutting them." Finally they contend that the doubling of damages under Civil Code section 3346 is distinct from attorney fees, which "are not damages." All of these contentions may have some validity. Nevertheless, none of them suggest that the trial court could not *consider* the tenuous connection between the licensing requirement and the harm, along with the statutory doubling of damages in exercising its discretion under Code of Civil Procedure section 1029.8 not to award attorney fees.

The record demonstrates that the trial court listened to the arguments of the parties and provided specific and reasonable explanations for why it viewed an award (even if statutorily authorized) as unwarranted. This is exactly what the statute contemplates when it states that an award, even when otherwise authorized, lies "in [the trial court's] discretion." (Code Civ. Proc., § 1029.8, subd. (a).) Consequently, even if the statute permitted an award of attorney fees in this case (a question we need not and do not decide), Braga and Wiley's contention that the trial court abused its discretion in declining to award such fees must be rejected.

B. *The Trial Court Did Not Err in Declining to Award Prejudgment Interest*

Braga and Wiley next contend that the trial court erred in declining to award prejudgment interest. Again, we disagree.

After the verdict, Braga and Wiley filed a motion seeking prejudgment interest on the damages award under Civil Code section 3287. That section provides that "[e]very person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is

entitled also to recover interest thereon from that day . . . ." (Civ. Code, § 3287, subd. (a).)[3] The trial court denied the motion, ruling that the damages were not certain until the verdict was rendered. The court identified a number of variables that precluded determining the damages with certainty, including the exact location of the trees, the height of the trees and the type of replacements that would be reasonable under the circumstances (e.g., whether full-grown Cypress trees could be replanted in the area). The court stated "that there is no way in good conscience anyone could say this amount was . . . verifiable . . . before it came to trial."[4]

Braga and Wiley argue the trial court erred because the location of the trees could be easily determined through a property survey, and any variability with respect to the replacement costs was insufficient to defeat an award of prejudgment interest.

"Damages are deemed certain or capable of being made certain within the provisions of subdivision (a) of [Civil Code] section 3287 where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to

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3 If the statutory preconditions are satisfied, prejudgment interest must be "granted as a matter of right." (*Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 798 (*Levy-Zentner*).)

4 Braga and Wiley assert that the trial court also denied the request for prejudgment interest on the ground that "it did not believe it could award prejudgment interest because double damages were already awarded under Civil Code section 3346(a)." While we would be required to affirm even if the trial court relied on an alternative erroneous ground (in addition to a valid ground), we do not believe the record supports Braga and Wiley's assertion. Although the trial court referenced the "generous [damages] award" in its ruling, it did not indicate that the statutory doubling precluded prejudgment interest.

damage." (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958 [prejudgment interest appropriate where "'"the amount of the plaintiff's claim"'" can be determined by established market values or by computation]; *Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 907 [stating that the test is whether the defendant actually knows "the amount owed or from reasonably available information could . . . compute[] that amount"].)

As the trial court noted, even assuming Ogden's liability, there was little agreement between the parties as to the appropriate damages. One option for calculating damages was the replacement cost of relatively inexpensive saplings that would, with time, grow to the same height of the trees that were removed. Braga and Wiley disputed that this was the appropriate measure of damages, but proposed inconsistent estimates of the proper cost of replacement trees.

In a letter dated February 28, 2006, Braga wrote to Ogden that the most comparable (7.2 foot) replacement trees she could find would cost $229 each, although she emphasized that the Cypress trees were "impossible to replace." In a subsequent March 14, 2006 letter, Braga stated that she had located comparable 6-foot trees that cost $4,000 each. Later, in the complaint, Braga and Wiley stated that the 30 trees Ogden removed "had an approximate reasonable value of $300,000[,]" or $10,000 each. (*Levy-Zentner*, *supra*, 74 Cal.App.3d at p. 802 [recognizing that the variance in a plaintiff's demand for compensation is a "factor . . . to consider" in determining the certainty of damages].) Given these wildly variable statements as to the replacement cost of the trees and the absence of any alternative market-based indicator of Braga and Wiley's loss, we

agree with the trial court that the damages were not sufficiently certain to trigger an award of prejudgment interest. (*Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 721 [in light of the "'conflicting evidence'" as to the value of disputed property, "the requirements under Civil Code section 3287 were not met" and party was "not entitled to prejudgment interest"]; *Duale v. Mercedes-Benz USA, LLC* (2007) 148 Cal.App.4th 718, 729 [prejudgment interest not proper where "amount of damages could not be resolved except by verdict"].) Consequently, we conclude the trial court did not err.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.